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83-1270

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

EDWARD W. DAILEY AND
MARY JANE DAILEY,

PETITIONERS,

VS.

COMMISSIONER OF INTERNAL
REVENUE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I. Question Presented for Review

Do the undisputed facts concerning investments (art objects and antiques) segregated in vacant rooms, acquired as a result of a mother's concerns about future financial security, establish taxpayers' entitlement to deductions for ordinary and necessary expenses?

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III. Table of Authorities

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IV. References to Reports of Opinions Delivered Below

The opinion of the U.S. Court of Appeals for the Eighth Circuit in Dailey v. Commissioner and its opinion on rehearing were not officially reported.

Tax Court Decision Dailey v. Commissioner is officially reported T.C. Memo. 1982-591. Unofficially CCH Dec. 39,413(M) and ¶82,591 P-H Memo TC.

V. Grounds on Which Jurisdiction is Invoked

a) Date of Judgment or Decree Sought to be Reviewed:

August 23, 1983, U.S. Court of Appeals for the Eighth Circuit affirmed October 7, 1982, ruling of U.S. Tax Court.

b) Date of Order Respecting Rehearing:

September 27, 1983, U.S. Court of Appeals for the Eighth Circuit granted rehearing. November 1, 1983, U.S. Court of Appeals entered decision after rehearing, again affirming ruling of U.S. Tax Court.

c) Statutory Provision Conferring Jurisdiction for Review by Writ of Certiorari:

28 U.S.C. §1254(1).

VI. Statutes and Regulations Which the Case Involves

26 U.S.C. §212:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax."

26 C.F.R. §1.212-1 and 26 C.F.R. §1.183-2 are set out in Appendix.

VII. Statement of Case

Basis of original federal jurisdiction in U.S. Tax Court: 26 U.S.C. §6213. Tax Court found for the Commissioner. The result was affirmed in the U.S. Court of Appeals for the Eighth Circuit. On rehearing the result was again affirmed.

This case concerns deductions for a trip to England and deductions for journals and publications regarding art objects and antiques. The deductions were no different from deductions for a seminar on the purchase of gold, silver or common stocks and a subscription to the Wall Street Journal.

Following marriage in 1945, Mary Jane and Edward Dailey commenced an investment program involving purchase of antiques and art objects. Many good acquisitions were made. Eighth Circuit Appendix at 53.

Mary Jane subscribed to various pub-

lications for research and study. Books about antiques and art objects and values were acquired and studied to improve skills. Her knowledge assisted her in selecting investments at good prices with potential for substantial gain. Eighth Circuit Appendix at 53 and 54.

Because Mary Jane and Edward were interested in furthering their investment program, a trip to England sponsored in 1977, by Wendell Garrett, Editor and Publisher of The Magazine Antiques was chosen. Among other things, the trip involved visits to museums, talks and lectures by curators including Clyde Wainwright, with respect to some of the furniture in Victoria and Albert Museum. A concentrated program was presented as detailed on Exhibit 4-D of trial stipulation.

The Magazine Antiques trip to England

was the third time taxpayers had been to England. Eighth Circuit Appendix at 73. The 1977 trip was devoted to honing skills in the management, conservation and maintenance of investment properties. Eighth Circuit Appendix at 73-77.

Mary Jane took satisfaction in the trip because she takes satisfaction in doing anything well. The London trip was a job well done. It was not a trip for personal pleasure and satisfaction. Eighth Circuit Appendix at 75 and 76.

Mary Jane learned much concerning porcelain and enhancing her skills in the knowledge of marketing management. Eighth Circuit Appendix at 77. Mary Jane knew porcelain, but after being in England and seeing real examples and knowing what she saw was quality, it became easier to recognize good investments. Eighth Circuit Appendix at 77 and

78.

During the trip Mary Jane and Edward acquired knowledge about English furniture which will be specifically useful with respect to investment assets previously acquired, and future acquisitions. See Eighth Circuit Appendix at 78 and 79.

The value of the investments acquired by Mary Jane and Edward is several times purchase price. Good antiques and art objects have appreciated in value and continue to appreciate. Eighth Circuit Appendix at 79.

The area of Burlington, Iowa, where the Daileys reside, is a part of the Middle West which was settled by many families from England, Scandinavia, and Germany. There are sales of art objects and antiques which, if one is knowledgeable, offer excellent investment possibi-

lities. The value of Daileys' investments was estimated to be easily five to six times the original purchase price and, in some instances, more. Eighth Circuit Appendix at 80.

Mary Jane estimated the cost of the investments, reflected in Exhibit 7G to the Stipulation, as $15,000, for which she has carefully preserved receipts and records of all purchases. Eighth Circuit Appendix at 71.

Mary Jane displayed a postcard of the home of the taxpayers, built in 1902, which she described as being stuffed with investments. She described the home as quite large. Eighth Circuit Appendix at 80 and 81. The investments are stored in boxes, cupboards, unused bedrooms, and on the third floor. The investments are segregated in certain rooms of the house. Eighth Circuit Appendix at 81.

Taxpayers have a large home, third floor, second floor, first floor and basement, including about 16 rooms. Many cupboards just hold antiques. They are not on display. Mary Jane does not show them off. She reads about the antiques they have with a view toward sale at a later date.

Mary Jane purchased a wine glass in England during The Magazine Antiques learning experience (included in Trial Exhibit 7G) because it is a certified 17th century glass which she wanted for reference to see what 17th century glass authentically looks like. This was to know how to examine the qualities and characteristics which are important in judging glass. Eighth Circuit Appendix at 85.

Mary Jane assembled Exhibit 7G during the summer of 1982, based upon receipts,

notes, sales bills and other records which she preserved. She was busy raising a family, buying and preserving and protecting the antiques, so she put the records in boxes with the idea that she would compile the ultimate figures based upon the stored records as needed. Eighth Circuit Appendix at 85 and 86.

Previously, she had not formally compiled the totals of the records. She did not have the time. With the youngest child in her junior year of college, time was finally becoming available to devote to formal record keeping. Eighth Circuit Appendix at 86.

Mary Jane states she will use all the investments for income--in four or five years she hopes Edward can retire. Eighth Circuit Appendix at 87. She will sell the investments when post-retirement income, from whatever source, is not

sufficient to live as accustomed. Mary Jane did not think there would be enough income for taxpayers to live as accustomed without selling antiques and art objects. Cf. Eighth Circuit Appendix at 87.

Mary Jane regularly spends time on the investment program studying books and journals. If she is available and without other commitments or family matters which must be looked after, she attends sales. Edward frequently accompanies her. Eighth Circuit Appendix at 89.

Mary Jane and Edward, jointly make decisions in many areas. Edward is, in certain areas, more knowledgeable about antiques and art objects than Mary Jane. Eighth Circuit Appendix at 89 and 90.

Taxpayers together joined and belonged to the Iowa Art Institute, the

Chicago Art Institute, and the Nelson Gallery in Kansas City. They attended and visited exhibits and shows at each of the galleries and lectures, all with regard to the gallery collections. Eighth Circuit Appendix at 72 and 73.

Mary Jane and Edward demonstrated a history of museum visitation and reading for the specific purpose of acquiring investment knowledge.

Edward W. Dailey testified that he considers himself a fortunate, lucky lawyer, with an excellent family. His practice has been rewarding. The 1977 federal income tax return illustrates Mary Jane and Edward paid substantial taxes. The needs of eleven children were met. Through it all the investment program was maintained. Eighth Circuit Appendix at 96.

Edward, together with Mary Jane,

spent much time on their investment program, probably more than many people do. It was done because a demanding law practice, and the raising of a family of eleven children, made this form of investment more suitable than other perhaps more stereotype forms of investment. See Eighth Circuit Appendix at 97.

Edward referred to his early investments such as buying coins, and old black-mark Belleek china. They have Scrimshaw, many old walnut marble-top tables and other items. Eighth Circuit Appendix at 97 and 98.

Edward testified they have no problem storing art objects and antiques for the future. He does not anticipate that at 71 and one-half years he has too many years left in a productive practice of law. Eighth Circuit Appendix at 98.

Edward testified the investment plan

is a program to, in the limited manner possible, with what funds can be invested, make acquisitions of art objects and antiques which at the appropriate time will be sold. Eighth Circuit Appendix at 98.

It has been the intention at all times since 1950, to buy items which taxpayers consider, because of their peculiar knowledge, will constitute successful income-producing items. Taxpayers have done everything necessary and proper to preserve, manage and protect those items over the years. Eighth Circuit Appendix at 100.

When Edward and Mary Jane married in 1945, they formulated the art objects and antique investment program. Mary Jane and Edward went to England to enhance their skills. Eighth Circuit Appendix at 101.

VIII. Reasons relied on for allowance of Writ

The Internal Revenue Service will probably with vigor resist certiorari. The amount of money involved here is small. The implications of this case on the ordinary taxpayer trying to accumulate investments for the production of income are large.

The IRS desires to ride roughshod over the rights of the individual, small investor contrary to the clear provisions of the law.

Taxpayers are not asking the Court merely to review the evidence and draw inferences. Taxpayers are asking the Court to send a message to the lower courts and to the IRS that a small individual-middle-class-investor should be treated fairly.

The Tax Court in its decision recog-

nized the undisputed fact that " * * * [T]he bulk of the antiques were kept in boxes in some of the vacant rooms of the home [of Mr. and Mrs. Dailey.]"

The August 23, 1983, Eighth Circuit Opinion recognized, "This is a close case."

The November 1, 1983, Eighth Circuit Opinion on rehearing states, "Had we tried the case de novo, we might well have decided that the Daileys did hold their antiques as an investment."

Unlike Wrightsman v. United States, 428 F2d 1316 (Ct. Cl. 1970), investment by Mr. and Mrs. Dailey was not merely a purpose for the Dailey Retirement Fund; it was the purpose. In Wrightsman, "The record revealed intensive personal use of various parts of their collection." Wrightsman v. United States, 428 F2d 1316, 1321 (Ct. Cl. 1970). Personal

pleasure, the Court ruled, was the primary purpose. Wrightsman v. United States, 428 F2d 1316, 1322 (Ct. Cl. 1970). The record concerning the Dailey Retirement Fund is just the opposite. The Dailey Retirement Fund is segregated.

Wrightsmans admitted they began their art collection as a hobby. Wrightsman v. United States, 428 F2d 1316, 1317 (Ct. Cl. 1970). The record in Dailey shows a retirement fund primary purpose from the outset.

If an art object or antique may be an investment, if one may legitimately acquire knowledge concerning managing, conserving and maintaining art objects and antiques held for an investment purpose, never will the Court have before it a stronger case for allowing the $5,177 of deductions taken here.

This is true because of, among other

reasons:

a) the size of taxpayers' Retirement Fund (See, e.g., Exhibit 7G, Eighth Circuit Appendix at 79, 80; Cf. Eighth Circuit Appendix at 68-71);

b) the segregation of Retirement Fund (See Eighth Circuit Appendix at 81-83 and 106);

c) the narrow investment purpose of Retirement Fund (See, e.g., Eighth Circuit Appendix at 53,54,67; Cf. Eighth Circuit Appendix at 86, 87,98,100,101);

d) the narrow purpose of the $5,177 expended for the management, conservation and maintenance of Retirement Fund (See, e.g., Eighth Circuit Appendix at 66, 74-77); and

e) the unique availability of the knowledge acquired in England due to Wendell Garrett's (Editor and Publisher of The Magazine Antiques) contacts, and

the specific utility to taxpayers of that knowledge in connection with the management, conservation and maintenance of Retirement Fund (See Eighth Circuit Appendix at 62, 77, 78; Cf. Eighth Circuit Appendix at 101, 40-44).

No danger of a slippery slope here. Only a danger of grave injustice if the Tax Court and Eighth Circuit are not reversed.

Deductions for "investment expenses" are allowed by 26 U.S.C. §212 if incurred for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income. See generally 26 C.F.R. §1.212-1.

The burden is on taxpayers to show as a factual matter, from an objective view of the operative circumstances, that they acquired and held the antiques and

art objects primarily for investment, rather than for personal use and enjoyment. See 26 C.F.R. §1.183-2.

Virtually all of the objective facts are in favor of Mr. and Mrs. Dailey.

The record shows that essentially all of the investment art objects and antiques are stored in boxes, cupboards, unused bedrooms and on the third floor. Eighth Circuit Appendix at 81.

Insurance or not, the investment program is legitimate and proper. Lack of insurance is simply an investment judgment. Whether the judgment is good or bad is irrelevant to whether the investment program is legitimate and valid. The fact that there has been no loss emphasizes that the non-maintenance of insurance was good business judgment. Eighth Circuit Appendix at 88. The factor of insurance is irrelevant here,

especially since people tend to insure both assets held for the production of income and assets not held for the production of income. The absence of insurance indicates a conscious investment judgment based on economics and prudent use of investment funds. Eighth Circuit Appendix at 88.

Mary Jane and Edward had a total record of the inventory of the art objects and antiques at all times. A list of the art objects and antiques was prepared in notebook form as a trial court exhibit (Exhibit 7G), showing that a competent inventory record of purchases was at all times maintained from which a page-by-page organization of art objects and antiques could be presented.

The complete records of the art objects and antiques maintained and as summarized in Exhibit 7G are solid,

objective facts documenting the validity of the investment program.

The record clearly documents with objective facts, the plan, the need, the investment program, the honing of the skills of the Daileys, and the successful program accomplished over many years while the needs of a family were otherwise met by Mary Jane and by the personal services in the law practice by Edward for 48+ years. The anticipated need for money was clearly demonstrated to be the investment program's purpose providing for the day when income from the law practice ended or lessened and the need occurs, whether by death or retirement of Edward. Why would an investor want to sell art objects and antiques constantly appreciating in value when no retirement has occurred.

Eighth Circuit Appendix at 75 and 76

reveals the only evidence in the case as to pleasure or satisfaction in the purchase of art objects and antiques for the investment program is that of Mary Jane, who stated in answer to a question:

> "A. Well it was done for the enhancement of our investment program. I took great satisfaction in it, because I take great satisfaction in doing anything well and this was a job well done." Eighth Circuit Appendix at 76.

Is it wrong and is it contrary to an investment program, whether it be stocks, bonds, farms, oil wells, to take satisfaction in doing well that which one is doing? Is it wrong for a mother and a wife to intelligently acquire investments for the future?

The objective facts of purchasing antiques and art objects, segregating them in vacant rooms to provide a retirement fund appears irrefutably to be an

accumulation of assets held for the production of income.

The issue here is not primarily grounded in fact. The issue is policy. The facts could not be clearer. There is little or no dispute as to facts.

The issue here is a policy issue going to the heart of the American system of taxation. Are middle income taxpayers who probably pay most of this country's bills going to be permitted a deduction which is clearly for the production of income despite IRS objections?

Taxpayers firmly believe Tax Court in the initial proceeding deprecated what was essentially the result of the part time efforts of a full time mother. Tax Court's term "floating expectation of profit" is nothing more than a term of social bias.

There appears to be a built-in social

bias that a mother of eleven children is somehow not entitled to be an investor.

Because she did not have the trappings of a Wall Street investor or a Texas oil baron, she was deemed not to be an investor.

The IRS would like to stop this case in its tracks. The issue, clearly framed, is one which the IRS would not like to see this Court face: Lost tax revenue if the middle income taxpayer is allowed to utilize a deduction which on the plain face of the statute and regulations exists.

There will be no change in the unjust, routine denial of legitimate deductions to middle-income taxpayers unless this Court grants certiorari.

An unjustifiable fear of a slippery slope is no excuse to negate clear Congressional intent that there be deduc-

tions for expenses in connection with property held for the production of income.

WHEREFORE, it is requested the Court grant Certiorari and, after hearing, reverse United States Court of Appeals for the Eighth Circuit and the United States Tax Court.

Respectfully submitted,

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ATTORNEYS FOR EDWARD W. DAILEY
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IX. Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1016

Edward W. Dailey and Mary Jane Dailey,	*	
Appellants,	*	Appeal from the
v.	*	United States Tax Court
Commissioner of Internal Revenue,	*	
Appellee.	*	

Filed November 1, 1983

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ON PETITION FOR REHEARING

Appellants Edward W. Dailey and Mary Jane Dailey have petitioned this court for rehearing of the decision rendered by this panel on August 23, 1983. We heard oral argument on the petition on October

11, 1983.

The Daileys make two main points in their petition for rehearing. First, they argue that the reasons given for the Tax Court ruling do not show that their antique collecting was a hobby, but rather those facts are merely a function of the small scale of their investments. The Daileys point out that they reared a family of eleven children, and thus had less money left over to invest for the future. They say that such money as they had was used to buy antiques, with the purpose of selling them for a profit when the need arose. Second, the Daileys point to two recent Tax Court decisions which they contend are inconsistent with the results reached in this case. Farrell v. Comm'r, T.C. Memo 1983-542 (Sept. 1, 1983); Burleson v. Comm'r, T.C. Memo 1983-570 (Sept. 15, 1983).

We recognize the problems inherent in providing for retirement while providing for one's family, and, as we noted in the panel opinion, the facts of this case are subject to differing interpretation. Had we tried the case de novo, we might well have decided that the Daileys did hold their antiques as an investment. However, the Tax Court decided otherwise, and that decision is supported by the evidence. Further, Burleson and Farrell are distinguishable from this case since the taxpayers there devoted significantly more time to the activities at issue than did the Daileys to their antique collecting.

For these reasons, we adhere to the panel decision and to our affirmance of the decision of the Tax Court.

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EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1016

Edward W. Dailey and Mary Jane Dailey,	*	
Appellants,	*	Appeal from the United States Tax Court
v.	*	
Commissioner of Internal Revenue,	*	
Appellee.	*	

Submitted: August 16, 1983

Filed: August 23, 1983

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

PER CURIAM.

Mary Jane and Edward W. Dailey appeal from a decision by the United States Tax Court[1] affirming the Commissioner's decision to disallow deductions for

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[1] The Honorable Richard C. Wilbur

decision to disallow deductions for travel expenses for trips to museums in England and the United States and for the cost of journals on antiques. The Daileys contend that these expenses were incurred as part of the production and management of income and thus are deductible under 26 U.S.C. §212. We affirm.

Mr. and Mrs. Dailey began buying antiques on a small scale over thirty years ago, soon after their marriage. The Daileys testified that they did not have sufficient funds to spend in more traditional investments or to purchase insurance policies of annuities. According to their testimony, they viewed the antiques they bought as their "Retirement Fund," and considered the purchases to be investments since they intended to resell the antiques in the

future, either upon retirement or the death of Mr. Dailey. Their collection has grown steadily over the years, and Mr. and Mrs. Dailey have acquired substantial knowledge in the field.

While the Daileys have bought some antiques for their personal use, most have been stored in unoccupied rooms of their large home. The Daileys have kept receipts for all their purchases, but have no formal recordkeeping system. They have not sold any of their antiques.

In 1977 the Daileys took a two week trip to England. That trip was organized by Antiques Magazine, and included tours of several museums, lectures by several noted authorities on antiques, and visits to a number of private collections. The trip provided some free time, but most of the days were spent on antique-related events. The Daileys claim a deduction of

$4,050.00 for the expense of this trip. The Daileys also deducted $926.00 for travel to museums in the United States, and $201.00 for the cost of subscriptions to a number of antique journals.

The Daileys argue that they took the trip to England in order to increase their knowledge of English antiques. They testified before the court that English furniture, glassware and porcelain are available in Iowa because of the large number of English pioneers who settled there, and that the knowledge acquired on the trip to England has helped them make better purchases. They made only one purchase on the trip to England, a seventeenth century wine glass. The Daileys also argue that the journal subscriptions aid them in keeping up with the antique business, and that they learn a great deal about antiques

from these journals.

Deductions for "investment expenses" are allowed under §212 if the expenses were incurred for the production of collection of income, or for the management, conservation, or maintenance of property held for the production of income. The burden is on the taxpayers to show, "as a factual matter, from an objective view of the operative circumstances," that they acquired and held the antiques "primarily for investment, rather than for personal use and enjoyment." Wrightsman v. United States, 428 F.2d 1316, 1320 (Ct. Cl. 1970); see Treasury Regulations, 26 C.F.R. §§1.83-2, 1.212-1(c). The Tax court held that the Daileys collected antiques for both fun and profit, but that while they hoped to make a profit through appreciation, they had never sold an item or even offered an item for sale.

While the Tax Court did not explicitly consider the issue in terms of whether the primary objective was investment or hobby the court did compare their collecting activities to that of a stamp collector, and concluded that the Daileys' interest in antiques was a "cultural interest" they found "personally enjoyable," and termed the investment aspect only a "floating expectation."

These findings of fact must stand unless clearly erroneous. Commissioner v. Duberstein, 363 U.S. 278, 291 (1960); 26 U.S.C. §7482(a). The evidence supporting the Tax Court's decision consists of testimony that the Daileys used some of the antiques; the antiques were not separately insured; no inventory was kept;[2] no antiques had yet been sold,

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[2] an inventory was prepared in the course of this litigation.

not even to dispose of items which weren't appreciating in value; and they would sell their antiques only to the extent that they needed money.

On the other hand, there is more than minimal evidence for the opposite conclusion. Certainly the Daileys may be said to have viewed their antiques as investments. Most were not used, but were stored in vacant rooms. Records, however unorganized, were kept. The mere fact that the Daileys enjoyed buying antiques is not inconsistent with a finding that they were bought for investment purposes.

This is a close case. However, there is substantial support for the Tax Court's findings, and we cannot say they are clearly erroneous. Therefore, we affirm.

A true copy.

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EIGHTH CIRCUIT

T. C. Memo. 1982-591

UNITED STATES TAX COURT

EDWARD W. DAILEY AND MARY JANE DAILEY, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 20404-81 Filed October 7, 1982

Edward W. Dailey, pro se.

Donald L. Wells, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WILBUR, Judge: Respondent determined deficiencies in petitioners' Federal income taxes for the years 1977 and 1978 in the amounts of $2,502 and $642, respectively. Due to concessions by the parties, the only issue remaining is whether travel expenses for trips to museums (including a trip to Europe) as well as the cost of journals on antiques are deductible in 1977 as an expense

incurred for the production of income under section 212.[1]

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and the attached exhibits are incorporated herein by this reference.

Petitioners Edward W. Dailey and Mary Jane Dailey resided in Burlington, Iowa at the time they filed their petition herein. Petitioners filed timely joint Federal income tax returns for 1977 and 1978.

Mrs. Dailey acquired an interest in art and antiques from her mother. Both petitioners (but particularly Mrs. Dailey) have used their acquired expertise to purchase a substantial number of art

---

1. All section references are to the Internal Revenue Code of 1954, as in effect during the tax year in issue, unless otherwise indicated.

objects and antiques over a period of nearly thirty years.

The petitioners used some of the antiques in their large home of 16 rooms. However, the bulk of the antiques were kept in boxes in some of the vacant rooms of the home. Receipts were kept, but it was not until the preparation of this case for trial that anything approaching a comprehensive inventory was prepared. The items were not separately insured.

Petitioners raised a large family (eleven children), and still have three children in school, although Mr. Dailey is 72 years old. Petitioners collected these antique and art items in part for personal reasons. However, an important motivating factor was the desire to purchase items that would appreciate substantially in value, providing a nest egg for retirement or for Mrs. Dailey

should Mr. Dailey (who is 12 years her senior) predecease her. Petitioners never advertised or offered for sale any of the items acquired, and none have been sold.

During 1977, Antiques Magazine sponsored a trip to England which took place during the period of June 4 to June 19. Petitioners paid travel expenses for fares and passports in conjunction with this trip in an amount not less than $4,050, and deducted this amount on their 1977 joint Federal income tax return. They contend that travel for visits to museums in England was a necessary investment expense. On their 1977 joint Federal income tax return, petitioners deducted the additional amount of $926 for travel to various museums in this country, making a total deduction for this purpose in the amount of $4,976.

Petitioners also deducted $201 for subscriptions to art and antique journals, that were used for learning and reference in conjunction with their collecting activities.

OPINION

Petitioners are very knowledgeable about art and antiques. They have acquired this knowledge over the last three decades, during which they purchased many items that have appreciated substantially in value. In 1977 they traveled to Europe on a trip sponsored by Antiques Magazine. They did not add to their acquisitions during this trip, but they visited museums and by their association with knowledgeable people on the trip or at destinations visited, they added greatly to their knowledge. Accordingly, they deducted the expense of this trip as an "investment expense" along with

similar costs for domestic travel and subscriptions to magazines.

Section 212 provides:

> In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--
>
> (1) for the production or collection of income;
>
> (2) for the management, conservation, or maintenance of property held for the production of income; * * *

Section 1.212-1(d), Income Tax Regs., provides that "[e]xpenses, to be deductible under section 212, must be 'ordinary and necessary'. Thus, such expenses must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income." See Kinney v. Commissioner, 66 T.C. 122 (1976).

Petitioners collected art and antique items for fun and profit, much like a philatelist might collect stamps, or a numismatist coins. Over a period of more than three decades, petitioners never advertised any item for sale, never offered an item for sale, and in fact never sold an item. A comprehensive inventory was first prepared in connection with this trial. They hoped to make a profit through appreciation, but so does the numismatist or philatelist. This floating expectation does not make the trip to Europe or to museums in this country deductible. Under petitioners' theory, expenses incurred in 1950 would be deductible even though nothing had been disposed of thirty years later and might not be disposed of (if at all), for many more years in the future.

Petitioners had a floating and perhaps personally important expectation that their cultural interest in art and antiques would ultimately prove profitable, as well as personally enjoyable. Again, so does the philatelist or numismatist, but this does not make deductions for a European trip (or the other expenses before us) deductible. Accordingly, we decide this issue for respondent.

Decision will be entered for the respondent.

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26 C.F.R. §1.212-1:

"Nontrade or nonbusiness expenses.

(a) an expense may be deducted under section 212 only if--

(1) It has been paid or incurred by the taxpayer during the taxable year (i)

for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, of (ii) for the management, conservation, or maintenance of property held for the production of such income, or (iii) in connection with the determination, collection, or refund of any tax; and

(2) It is an ordinary and necessary expense for any of the purposes stated in subparagraph (1) of this paragraph.

(b) The term "income" for the purpose of section 212 includes not merely income of the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. For example, if defaulted bonds, the interest from which if received would be includible in income, are purchased with the expectation of realizing capital gain on their resale, even though no current yield thereon is anticipated, ordinary and necessary expenses thereafter paid or incurred in connection with such bonds are deductible. Similarly, ordinary and necessary expenses paid or incurred in the management, conservation, or maintenance of a building devoted to rental purposes are deductible notwithstanding that there is actually no income therefrom in the taxable year, and regardless of the manner in which or the purpose for which the property in question was acquired. Expenses paid or incurred in managing, conserving, or

maintaining property held for investment may be deductible under section 212 even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto.

(c) In the case of taxable years beginning before January 1, 1970, expenses of carrying on transactions which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses. The question whether or not a transaction is carried on primarily for the production of income or for the management, conservation or maintenance of property held for the production or collection of income, rather than primarily as a sport, hobby, or recreation, is not to be determined solely from the intention of the taxpayer but rather from all the circumstances of the case. For example, consideration will be given to the record of prior gain or loss of the taxpayer in the activity, the relation between the type of activity and the principal occupation of the taxpayer, and the uses to which the property or what it produces is put by the taxpayer. For provisions relating to activities not engaged in for profit applicable to taxable years beginning after December

31, 1969, see section 183 and the regulations thereunder.

(d) Expenses, to be deductible under section 212, must be "ordinary and necessary." Thus, such expenses must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of property held for the production of income.

(e) A deduction under section 212 is subject to the restrictions and limitations in part IX (section 261 and following), subchapter B, chapter 1 of the Code, relating to items not deductible. Thus, no deduction is allowable under section 212 for any amount allocable to the production or collection of one or more classes of income which are not includible in gross income, or for any amount allocable to the management, conservation, or maintenance of property held for the production of income which is not included in gross income. See section 265. Nor does section 212 allow the deduction of any expenses which are disallowed by any of the provisions of subtitle A of the Code, even though such expenses may be paid or incurred for one of the purposes specified in section 212.

(f) Among expenditures not allowable as deductions under section 212 are the following: Commuter's expenses; expenses of taking special courses or training; expenses for improving personal appearance; the cost of rental of a safe-deposit box for storing jewelry and other

personal effects; expenses such as those paid or incurred in seeking employment or in placing oneself in a position to begin rendering personal services for compensation, campaign expenses of a candidate for public office, bar examination fees and other expenses paid or incurred in securing admission to the bar, and corresponding fees and expenses paid or incurred by physicians, dentists, accountants, and other taxpayers for securing the right to practice their respective professions. See, however, section 162 and the regulations thereunder.

(g) Fees for services of investment counsel, custodial fees, clerical help, office rent, and similar expenses paid or incurred by a taxpayer in connection with investments held by him are deductible under section 212 only if (1) they are paid or incurred by the taxpayer for the production or collection of income or for the management, conservation, or maintenance of investments held by him for the production of income, and (2) they are ordinary and necessary under all the circumstances, having regard of the type of investment and to the relation of the taxpayer to such investment.

(h) Ordinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held for use as a residence by the taxpayer are not deductible. However, ordinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held by the taxpayer as rental property are deductible even

though such property was formerly held by the taxpayer for use as a home.

(i) Reasonable amounts paid or incurred by the fiduciary of an estate or trust on account of administration expenses, including fiduciaries' fees and expenses of litigation, which are ordinary and necessary in connection with the performance of the duties of administration are deductible under section 212, notwithstanding that the estate or trust is not engaged in a trade or business, except to the extent that such expenses are allocable to the production or collection of tax-exempt income. But see section 642(g) and the regulations thereunder for disallowance of such deductions to an estate where such items are allowed as a deduction under section 2053 or 2054 in computing the net estate subject to the estate tax.

(j) Reasonable amounts paid or incurred for the services of a guardian or committee for a ward or minor, and other expenses of guardians and committees which are ordinary and necessary, in connection with the production or collection of income inuring to the ward or minor, or in connection with the management, conservation, or maintenance of property, held for the production of income, belonging to the ward or minor, are deductible.

(k) Expenses paid or incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in gross income), or in

developing or improving property, constitute a part of the cost of the property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in collecting such rents. Expenses paid or incurred in protecting or asserting one's right to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible.

(l) Expenses paid or incurred by an individual in connection with the determination, collection, or refund of any tax, whether the taxing authority be Federal, State, or municipal, and whether the tax be income, estate, gift, property, or any other tax, are deductible. Thus, expenses paid or incurred by a taxpayer for tax counsel or expenses paid or incurred in connection with the preparation of his tax returns or in connection with any proceedings involved in determining the extent of his tax liability or in contesting his tax liability are deductible.

(m) An expense (not otherwise deductible) paid or incurred by an individual in determining or contesting a liability asserted against him does not become deductible by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability.

(n) Capital expenditures are not

allowable as nontrade or nonbusiness expenses. The deduction of an item otherwise allowable under section 212 will not be disallowed simply because the taxpayer was entitled under subtitle A of the Code to treat such item as a capital expenditure, rather than to deduct it as an expense. For example, see section 26. Where, however, the item may properly be treated only as a capital expenditure or where it was properly so treated under an option granted in subtitle A of the Code, no deduction is allowable under section 212; and this is true regardless of whether any basis adjustment is allowed under any other provision of the Code.

(o) The provisions of section 212 are not intended in any way to disallow expenses which would otherwise be allowable under section 162 and the regulations thereunder. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code of 1954 cannot again be deducted under any other provision thereof.

(p) Frustration of public policy. The deduction of a payment will be disallowed under section 212 if the payment is of a type for which a deduction would be disallowed under section 162(c),(f), or (g) and the regulations thereunder in the case of a business expense.

26 C.F.R. §1.183-2:

"Activity not engaged in for profit defined.

(a) In general. For purposes of section 183 and the regulations thereunder, the term "activity not engaged in for profit" means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212. Deductions are allowable under section 162 for expenses of carrying on activities which constitute a trade or business of the taxpayer and under section 212 for expenses incurred in connection with activities engaged in for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. Except as provided in section 183 and §1.183-1, no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit. Thus, for example, deductions are not allowable under section 162 or 212 for activities which are carried on primarily as a sport, hobby, or for recreation. The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. In determining whether such an objective exists, it may be sufficient

that there is a small chance of making a large profit. Thus it may be found that an investor in a wildcat oil well who incurs very substantial expenditures is in the venture for profit even though the expectation of a profit might be considered unreasonable. In determining whether an activity is engaged in for profit, greater weight is given to objective facts than to the taxpayer's mere statement of his intent.

(b) Relevant factors. In determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account. No one factor is determinative in making this determination. In addition, it is not intended that only the factors described in this paragraph are to be taken into account in making the determination, or that a determination is to be made on the basis that the number of factors (whether or not listed in this paragraph) indicating a profit objective, or vice versa. Among the factors which should normally be taken into account are the following:

(1) Manner in which the taxpayer carries on the activity. The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit. Similarly, where an activity is carried on in a manner substantially similar to other activities of the same nature which are profitable, a profit motive may be indicated. A change of operating methods, adoption of new techniques or abandonment of unprofitable

methods in a manner consistent with an intent to improve profitability may also indicate a profit motive.

(2) The expertise of the taxpayer or his advisors. Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance with such practices. Where a taxpayer has such preparation or procures such expert advice, but does not carry on the activity in accordance with such practices, a lack of intent to derive profit may be indicated unless it appears that the taxpayer is attempting to develop new or superior techniques which may result in profits from the activity.

(3) The time and effort expended by the taxpayer in carrying on the activity. The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit. The fact that the taxpayer devotes a limited amount of time to an activity does not necessarily indicate a lack of profit motive where the taxpayer employs competent and qualified persons to carry on such activity.

(4) Expectation that assets used in

activity may appreciate in value. The term "profit" encompasses appreciation in the value of assets, such as land, used in the activity. Thus, the taxpayer may intend to derive a profit from the operation of the activity, and may also intend that, even if no profit from current operations is derived, an overall profit will result when appreciation in the value of land used in the activity is realized since income from the activity together with the appreciation of land will exceed expenses of operation. See, however, paragraph (d) of §1.183-1 for definition of an activity in this connection.

(5) The success of the taxpayer in carrying on other similar or dissimilar activities. The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable.

(6) The taxpayer's history of income of losses with respect to the activity. A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status such continued losses, if not explainable, as due to customary business risks or reverses, may be indicative that the activity is not being engaged in for profit. If losses are sustained because

of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer, such as drought, disease, fire, theft, weather damages, other involuntary conversions, or depressed market conditions, such losses would not be an indication that the activity is not engaged in for profit. A series of years in which net income was realized would of course be strong evidence that the activity is engaged in for profit.

(7) The amount of ocasional profits, if any, which are earned. The amount of profits in relation to the amount of losses incurred, and in relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent. An occasional small profit from an activity generating large losses, or from an activity in which the taxpayer has made a large investment, would not generally be determinative that the activity is engaged in for profit. However, substantial profit, though only occasional, would generally be indicative that an activity is engaged in for profit, where the investment or losses are comparatively small. Moreover an opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only ocasional small profits are actually generated.

(8) The financial status of the taxpayer. The fact that the taxpayer does not have substantial income or capital from sources other than the activity may

indicate that an activity is engaged in for profit. Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved.

(9) Elements of personal pleasure or recreation. The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved. On the other hand, a profit motivation may be indicated where an activity lacks any appeal other than profit. It is not, however, necesary that an activity be engaged in with the exclusive intention of deriving a profit or with the intention of maximizing profits. For example, the availability of other investments which would yield a higher return, or which would be more likely to be profitable, is not evidence that an activity is not engaged in for profit. An activity will not be treated as not engaged in for profit merely because the taxpayer has purposes of motivations other than solely to make a profit. Also, the fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit if the activity is in fact engaged in for profit as evidenced by other factors whether or not listed in this paragraph.

* * * [balance of text omitted]"